

BEFORE THE UNITED STATES SECRETARY OF COMMERCE

Consistency Appeal of WesternGeco From an Objection by the North Carolina
Division of Coastal Management

**MOTION OF THE STATE OF NORTH CAROLINA TO REOPEN
THE RECORD TO RECEIVE EXPERT DECLARATION**

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The State of North Carolina (“State”), on behalf of itself and its Division of Coastal Management, submits that, for the following reasons, the Secretary of Commerce (“Secretary”) should reopen the record to receive the attached and proffered expert declaration of Dr. Douglas Nowacek or, in the alternative, the two documents that were added to the record on March 30, 2020 should be withdrawn from the record.

FACTS AND BACKGROUND

Briefing was completed in this matter on December 23, 2019 with the appellant’s filing of its reply brief. On the question of whether the “[t]he national interest furthered by the activity outweighs the activity’s adverse coastal effects,” 15 C.F.R. § 930.121(b), the parties focused in part on a study by McCauley et al. (2017). See Principal Br. of Appellant at 16-18 (Oct. 21, 2019); Br. of the State of N.C. in Opp’n to WesternGeco’s Req. to Override Consistency Determination at 28-29 (Dec. 3, 2019).

In support of its position, the State moved to supplement the record to include in the record, inter alia, a copy of McCauley’s paper. Mot. of the State of N.C. to Supplement the Consolidated R. & Resp. to Appellant’s Mot. to Supp. the Consolidated R. at 4-5 & Attach. A, p. 3 (Dec. 3, 2020). This motion was granted and McCauley’s study was included in the record. Order Re Mots. to Supplement the R./Contents of the Decision R. (Mar. 9, 2020).

On March 30, 2020, the National Oceanic and Atmospheric Administration (“NOAA”) published a notice in the Federal Register announcing that “the decision record has closed” for this appeal. 85 Fed. Reg. 17,539, 17,539/1. By email dated March 30, 2020 at 3:05 p.m., undersigned counsel received an order from NOAA announcing that it had entered into the record two documents. See Order Regarding Additional Supplementation of the Decision R.

(Mar. 30, 2020) (“Supplementation Order”). The first document was a study by Fields et al. (2019). The Fields study indicates that it was published in August 2019. This availability date is confirmed in the record index provided by NOAA with the order. Supp. Order, attach., p. 5. Despite this study being available in August 2019, neither of the parties discussed or cited the Fields study in their briefs, which were filed months later. To counsel’s knowledge, none of the federal agencies that commented (or declined to comment) on the proceedings as late as March 2020 mentioned the study either.

The second document that NOAA inserted into the record on March 30 was a NOAA memorandum. The memo is dated March 26, 2020 and announces a meeting “to discuss the status of the best available science relating to the effects of seismic surveys on North Atlantic right whales and other protected species.” As background, the memo asserts that “a recently described study (Fields et al., 2019) produced results inconsistent with those of McCauley et al. (2017), wherein increased zooplankton mortality relative to controls did not exceed 30 percent at any distance from the airgun, and mortality was not significantly different from controls at a distance of 20 meters.”

ARGUMENT

THE STATE SHOULD BE ALLOWED TO SUBMIT FURTHER INFORMATION TO THE RECORD REGARDING THE NEW DOCUMENTS OR, IN THE ALTERNATIVE, THE NEW DOCUMENTS SHOULD BE WITHDRAWN FROM THE RECORD.

The Coastal Zone Management Act provides that the Secretary may override a State’s consistency objection only “after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state.” 16 U.S.C. § 1456(c)(3)(A). The timing of NOAA’s submission to the record of the Fields study and its own internal memo deprived the State of the opportunity to provide detailed comments on this information. Accordingly, the State

should be permitted to file comments regarding these documents or the documents should be withdrawn from the record.

According to the Federal Register, the record closed on March 30, 2020. The State did not receive NOAA's new documents until 3:05 pm on March 30, 2020. Even if the record was open until midnight on March 30, NOAA cannot maintain that it provided the State sufficient time to provide any input regarding this information. In order to respond, the State needed to consult its Division of Coastal Management and outside experts, and then an expert required time to evaluate Fields' paper and draw up a statement – all of this while individuals were subject to stay-at-home orders due to the COVID-19 public health emergency. By any standard, the few hours on March 30 following NOAA's filing do not constitute "a reasonable opportunity" to provide "detailed comments" on NOAA's submission. 16 U.S.C. § 1456(c)(3)(A).

An administrative agency acts improperly when it fails to submit pivotal information to the record prior to the close of the record. See, e.g., Nat'l Wildlife Fed'n v. Marsh, 568 F. Supp. 985, 994 (D.D.C. 1983). The remedy is for the agency to reopen the record in order to receive comment on the information. E.g., Marathon Oil Co. v. EPA, 564 F.2d 1253, 1272 (9th Cir. 1977).

In this case, the State was prevented from providing comments on the Fields study and NOAA's internal memo before the close of the record. That NOAA may have technically submitted this information to the record before the record closed is of no moment. The effect is the same as if it had included those materials in the record after the record closed. Either way, the State was deprived of any realistic opportunity to comment on these documents.

The requirement to include materials in the record is designed not merely to document the agency's rationale for its decision and to create a record for judicial review. The requirement also provides a basis for meaningful comments from interested parties. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (D.C. Cir. 1977) ("We have insisted . . . that information in agency files or consultants' reports which the agency has identified as relevant to the proceeding be disclosed to the parties for adversarial comment."). NOAA's submission of the new documents on the date the record closed prevented interested parties, including the State, from having an opportunity to provide meaningful comments on the new documents.

The Fields study was published in August 2019. NOAA did not include it in the record until seven months later, after briefing had long since been completed. NOAA has not provided any explanation why it waited until the last minute to submit these documents to the record. NOAA's internal memo is devoid of any information that would suggest any legitimate reason why NOAA would withhold this study until the time to complete the record had all but run out.

The problem of the timing of the insertion of these documents into the record is compounded by the fact that the Secretary could have held the record open to receive additional comment. As the Secretary's order in the companion South Carolina case indicates, there was no requirement that the record close on March 30. See 85 Fed. Reg. 17,538 (Mar. 30, 2020). The Secretary retained the option to keep the record open to receive additional relevant information. 15 C.F.R. § 930.130(a)(2). Even now, the Secretary need not issue a decision until May 29, 2020, and that deadline also may be extended. Id. § 930.130(b). Accordingly, there is ample time to receive into the record the State's input on NOAA's recent submissions.

The State must assume that NOAA believes that the Fields study and NOAA's internal memo are important and consequential. Surely NOAA would not have submitted inconsequential

and unimportant documents simply to clutter the record and confuse the issues. Thus, the State should be permitted to comment on the documents and have those comments included in the decision record. On the other hand, if those documents are inconsequential and unimportant, then there is no reason why NOAA could not withdraw those documents from the record without affecting the integrity of the Secretary's decision.

Given the opportunity to comment, the State would provide the expert testimony of Dr. Douglas Nowacek. Dr. Nowacek would identify significant aspects of the Fields study that render untenable any conclusion that Fields is necessarily "inconsistent" with McCauley. For example, in Fields the pair of airguns was blasted only one time before the impacts on the target species were assessed. In sharp contrast, McCauley towed an airgun at a speed approximating a typical seismic survey and sounded the airgun about every twenty meters, as would occur in an actual survey. Thus, the impacts to zooplankton that McCauley observed resulted from experimental conditions that far more realistically approximated actual survey methods.¹ Neither the NOAA memorandum, nor Fields' paper, addressed this difference in study design.

Along with this motion, State is submitting Dr. Nowacek's expert declaration for the Secretary's consideration.

CONCLUSION

For these reasons, the State requests that the Secretary reopen the record for the purpose of accepting into the record the attached expert declaration of Dr. Douglas Nowacek. In the alternative, the State requests that NOAA withdraw from the record the two documents that it entered into the record on March 30, 2020.

¹ Even though the McCauley study was far more realistic than that of Fields, both studies used airgun setups that were substantially smaller than actual conditions. McCauley's study used one airgun. Fields used two. WesternGeco is proposing to use a twenty-four gun array.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Motion of the State of North Carolina to Reopen the Record to Receive Expert Declaration has been served on all parties and/or counsel by electronic mail (by agreement of the parties) to the addresses shown below:

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